The ACTING PRESIDENT pro tempore. The unanimous consent request is withdrawn.

Mr. REID. I apologize to my friend. It was the wrong unanimous consent request.

I note the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. REID. Mr. President we had a shuffling of unanimous consent requests, and obviously the wrong one was shuffled to me. I apologize for holding up my friends.

UNANIMOUS-CONSENT REQUESTS—AMENDMENT NO. 1401

Mr. REID. I ask unanimous consent that the second-degree amendment to the Levin-Reed amendment be withdrawn and that there be 6 hours of debate on the Levin-Reed amendment; at the conclusion or yielding back of that time, the Senate vote on the Levin-Reed amendment with no second-degree amendments in order thereto.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. KYL. Mr. President, I apologize. If I could ask the distinguished leader, was this with respect to the Levin-Reed amendment No. 1401?

Mr. REID. Yes. I did propound that request asking, basically, that we have an up-or-down vote on it. I have suggested 6 hours, but we would take any reasonable time.

Mr. KYL. Mr. President, if I could respond, and reserving the right to object, I assume that if the Cornyn amendment, which was designed to be a side-by-side amendment, and the Levin-Reed amendment could both be voted on and both had a 60-vote threshold, a time agreement could be worked out. I ask the majority leader, could the unanimous consent request be modified to incorporate that principle so that there wouldn't have to be cloture, but there could be a vote on both of those amendments?

Mr. REID. Mr. President, I have said earlier that we had to file cloture on the initial amendment of Senator JIM WEBB, which was an amendment that simply called for the proper rotation of our troops: 15 months in country, 15 months out of country. We wanted the Senate to speak its will on that with a simple majority, and we were unable to get it. We feel the same way about Levin-Reed. It is a very important policy decision this Senate needs to make. Not to change—I don't know what Cornyn is, but I am sure it is something that is much different than Levin-Reed. Therefore, if there is a suggestion that I amend my unanimous consent request to have some side-by-side, 60-vote margins, I would object to that. I believe we should have in that instance an up-or-down vote. I have no problem giving Senator CORNYN a majority vote, which I think would be very appropriate. I think that is where we need to be on this issue; that is, this issue of the Defense authorization bill. It is very unusual to have on the Defense authorization bill, even issues dealing with Iraq—in times passed, we haven't had a 60-vote margin.

So I would not accept my friend's suggestion that there be side by sides. I renew my request that there be a time for an up-or-down vote on the Levin-Reed amendment. I have suggested 6 hours.

The ACTING PRESIDENT pro tempore. Is there objection?

Mr. KYL. Yes, Mr. President, unfortunately, under that circumstance, I object.

The ACTING PRESIDENT pro tempore. The objection is heard.

Mr. REID. Mr. President, I want to express my apology to my friends because I held them up for a few minutes on their being able to speak. I apologize for that, but they do have a full hour.

Mr. President, my worst fears on this bill, the Defense authorization bill, have been realized. We have just seen the Republican leadership again resort to this technical maneuver to block progress on this crucial amendment. It would be one thing for the minority to vote against this bill. If they honestly believe that ''stay the course'' is the right strategy, they have the right to vote no. Now Republicans are using a filibuster to block us from even voting on the amendment that could bring this war to a responsible end. They are blocking this like they did the Webb amendment. They are protecting the President rather than protecting our troops by denying us an up-or-down, yes-or-no vote on the most important issue our country faces.

So I say through you to my Democratic and Republican colleagues that we are going to work on this amendment until we get an up-or-down vote on it. If that means staying in session—we have no votes, of course, tonight, but if it means staying in session all day tomorrow and all tomorrow night, that is what we will have to do. I will file cloture so that we can have a Wednesday vote, if this continues. I certainly hope during the next few hours and tomorrow that we will have a change of mind so we can have a vote and then move on to the other amendments. The American people deserve an honest debate on this war and deserve an up-or-down vote on this amendment which we believe will bring a responsible end to this intractable war in Iraq.

UNANIMOUS-CONSENT REQUEST—H.R. 1

Mr. REID. Mr. President, I have another unanimous-consent request, and this is the one I tried to offer earlier. I ask unanimous consent that if the House further amends H.R. 1 with the text of H.R. 1401 and requests a conference with the Senate, the Senate agree to the request and appoint the same conferees which the Senate has already appointed to H.R. 1.

The ACTING PRESIDENT pro tempore. Is there objection?

The PRESIDING OFFICER (Mr. SALAZAR). Is there objection?

Mr. KYL. Reserving the right to object, we have already agreed to the previous consent to go to conference on the 9/11 Commission legislation. We have named conferees on the part of the Senate.

As I understand it, the House wants to add a new bill to the conference, which includes provisions that were not included in either Chambers' 9/11 bill. I am not familiar with all the provisions of H.R. 1401, but I know the Senate has not acted on that bill, and we don't believe it was part of the 9/11 Commission recommendations.

Having said that, we need to object to this request at this time.

The PRESIDING OFFICER. Objection is heard.

MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will now be a period of morning business for 60 minutes, with Senators permitted to speak therein for up to 10 minutes each, with the time equally divided and controlled between the two leaders or their designees.

The Senator from Arizona is recognized.

ORDER OF PROCEDURE

Mr. KYL. Mr. President, I understand there has been an informal agreement that I would have up to 15 minutes, and Senator FEINSTEIN would then have 30 minutes. I would like to propound this as a unanimous consent agreement and also add that Senator ALLARD speak after that; that if there is time remaining from the time Senator ALLARD and I have of the 30 minutes, that be reserved for any other Republican Senator who may wish to speak.

The PRESIDING OFFICER. Without objection, it is so ordered.

DETAINEES IN IRAQ AND AFGHANISTAN

Mr. KYL. Mr. President, I wish to address a subject that I hope we will be able to address soon and that is an amendment that Senator GRAHAM of South Carolina has filed and, hopefully, we will debate soon. It relates to conditions that have been placed in the underlying bill, relating to the treatment of detainees captured in Afghanistan and Iraq.

I urge my colleagues to think very carefully about the damage that would

be brought on the global war against terrorists and future wars that we may have to fight if we go forward with the language that is in the bill, specifically in section 1023 of the bill. That essentially would return us to a law enforcement approach to terrorists that, frankly, failed us before 9/11 and, once Osama bin Laden and others declared war on us, would obviously not work in the post-9/11 context.

Senator GRAHAM's amendment strikes these harmful provisions in the bill and would replace them with commonsense measures to provide a more fair process in dealing with detainees at Guantanamo. I remind my colleagues for a moment about the nature of these terrorists whom we are talking about, and then I will go through specific provisions of the bill that need to be removed—specifically three: a requirement that al-Qaida terrorists held in Iraq and Afghanistan be given lawyers; the authorization to demands discovery and compel testimony from servicemembers; and the requirement that al-Qaida and Taliban detainees be provided access to classified evidence.

To review the nature of the detainees that we are holding, not just at Guantanamo Bay but also in Iraq and Afghanistan, these are not nice people. At least 30 of the detainees released from Guantanamo Bay have since returned to waging war against the United States and our allies; 12 of these released detainees have been killed in battle by U.S. forces and others have been recaptured; two released detainees became regional commanders for Taliban forces; one released detainee attacked U.S. and allied soldiers in Afghanistan, killing three Afghan soldiers; one released detainee killed an Afghan judge; one released detainee led a terrorist attack on a hotel in Pakistan and a kidnapping raid that resulted in the death of a Chinese civilian, and this former detainee recently told Pakistani journalists he planned to ''fight America and its allies until the very end.''

The provisions of section 1023 would make it very difficult, if not impossible, for the United States to detain these committed terrorists who have been captured while waging war against us. No nation has, in the history of armed conflict, imposed the kinds of limits that the bill would impose on its ability to detain enemy war prisoners. War prisoners released in the middle of an ongoing conflict, such as members of al-Qaida, will return to waging war. We have already seen this happen 30 times with detainees released from Guantanamo Bay. If section 1023 of the bill is enacted into law, we could expect that number to increase sharply. If section 1023 is enacted, we should expect that more civilians and Afghans and Iraqi soldiers will be killed, and it may be inevitable that our own soldiers will be injured or killed by such released terrorists. This is a price our Nation should not be forced to bear.

Let me talk first about the requirement in the bill that al-Qaida terrorists held in Iraq and Afghanistan must be provided with lawyers. This cannot be executed. It would require the release of detainees. Here is why: The Defense bill requires that counsel be provided and trials be conducted for all unlawful enemy combatants held by the United States, including, for example, al-Qaida members captured and detained in Iraq and Afghanistan if they are held for 2 years. We hold approximately 800 prisoners in Afghanistan and tens of thousands in Iraq. None of them are lawful combatants and all would arguably be entitled to a trial and a lawyer under the bill. Such a provision would at least require a military judge, a prosecutor, and a defense attorney, as well as other legal professionals.

That scheme is not realistic. The entire Army JAG Corps only consists of approximately 1,500 officers, and each is busy with their current duties. Moreover, under the bill, each detainee would be permitted to retain a private or volunteer counsel. Our agreements with the Iraqi Government bar the United States from transferring Iraqi detainees out of Iraq. As a result, the bill would require the United States to train and transport and house and protect potentially thousands, or even tens of thousands, of private lawyers in the middle of a war zone during ongoing hostilities. That is impossible.

That proposal is half baked at best. It would likely force the United States to release thousands of enemy combatants in Iraq, giving them the ability to resume waging war against the United States. Obviously, this would tie up our military. By requiring a trial for each detainee, this provision would also require U.S. soldiers to offer statements to criminal investigators, needing later to prove their case after they captured someone. They would need to carry some kind of evidence kits or combat cameras or some other method of preserving the evidence and to establish its chain of custody. They would need to spend hours after each trial writing afteraction reports, which would need to be reviewed by commanders. Valuable time would be taken away from combat operations and soldiers' rest.

It would be a bad precedent for the future. Aside from the war in Iraq, this provision would make fighting a major war in the future simply impossible. Consider this: During World War II, the United States detained over 2 million enemy war prisoners. It would have been impossible for the United States to have conducted a trial and provided counsel to 2 million captured enemy combatants. So the bottom line is that the bill, as written, would likely be impossible to implement in Iraq and, in the context of past wars, it is patently absurd.

The second point is authorizing al-Qaida detainees to demand discovery and compel testimony from American soldiers. The underlying bill would actually authorize unlawful enemy combatants, including al-Qaida detained in Iraq and Afghanistan, to demand discovery and could compel testimony from witnesses as we do in our criminal courts in the United States. The witnesses would be the U.S. soldiers who captured the prisoner. Under this bill, an American soldier could literally be recalled from his unit at the whim of an al-Qaida terrorist in order to be cross-examined by a judge or that terrorist.

Newspaper columnist Stewart Taylor describes the questions that such a right would raise:

> Should a Marine sergeant be pulled out of combat in Afghanistan to testify at a detention hearing about when, where, how, and why he had captured the detainee? What if the northern alliance or some other ally made the capture? Should the military be ordered to deliver high-level al-Qaida prisoners to be cross-examined by other detainees and their lawyers?

The questions abound. As the Supreme Court observed in Johnson v. Eisenstrager, which is the law on this subject:

> It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil court and divert his efforts and attention from the military offensive abroad to the legal defensive at home.

That is what the U.S. Supreme Court said in World War II when a similar issue was raised. It would be difficult to conceive of a process that would be more insulting to our soldiers. In addition, many al-Qaida members who were captured in Afghanistan were captured by special operators whose identities are kept secret for obvious reasons. This would force them to reveal themselves to al-Qaida members, therefore exposing themselves or to simply forgo the prosecution of the individual, which is more likely what would happen.

Clearly, Americans should not be subject to subpoena by al-Qaida. That brings me to the last point—the requirement that al-Qaida and Taliban detainees be provided with access to classified evidence. The bill requires that detainees be provided with ''a sufficiently specific substitute of classified evidence'' and that detainees' private lawyers be given access to all relevant classified evidence.

Foreign and domestic intelligence agencies are already very hesitant to divulge classified evidence to the CSRT hearings we currently conduct. These are part of the internal and nonadversarial military process today. Intelligence agencies will inevitably refuse to provide sensitive evidence to detainees and their lawyers. They will not risk compromising such information for the sake of detaining an individual terrorist.

In addition, the United States already has tenuous relations with some of the foreign governments, particularly in the Middle East, that have

been our best sources of intelligence about al-Qaida. If we give detainees a legal right to access such information, these foreign governments may simply shut off all further supply of information to the United States. These governments will not want to compromise their evidence or expose the fact that they cooperated with the United States. By exposing our cooperation with these governments, the bill perversely applies a sort of ''stop snitching'' policy toward our Middle Eastern allies, which is likely to be as effective as when applied to criminal street gangs in the United States.

A final point on this: We already know from hard experience that providing classified and other sensitive information to al-Qaida members is a bad idea. During the 1995 Federal prosecution in New York of the ''Blind Sheikh,'' Omar Rahman, prosecutors turned over the names of 200 unindicted coconspirators to the defense. The prosecutors were required to do so under the civilian criminal justice system of discovery rules, which require that large amounts of evidence be turned over to the defense. The judge warned the defense that the information could only be used to prepare for trial and not for other purposes. Nevertheless, within 10 days of being turned over to the defense, the information found its way to Sudan and into the hands of Osama bin Laden. U.S. District Judge Michael Mukasey, who presided over the case, explained, ''That list was in downtown Khartoum within 10 days, and bin Laden was aware within 10 days that the Government was on his trail.''

That is what happens when you provide classified information in this context.

In another case tried in the civilian criminal justice system, testimony about the use of cell phones tipped off terrorists as to how the Government was monitoring their networks. According to the judge, ''There was a piece of innocuous testimony about the delivery of a battery for a cell phone.'' This testimony alerted terrorists to Government surveillance and, as a result, their communication network shut down within days and intelligence was lost to the Government forever—intelligence that might have prevented who knows what.

This bill—this particular section of the bill repeats the mistakes of the past. Treating the war with al-Qaida similar to a criminal justice investigation would force the United States to choose between compromising information that could be used to prevent future terrorist attacks and letting captured terrorists go free. This is not a choice that our Nation should be required to make.

I will talk more about some provisions that Senator GRAHAM would like to substitute for these provisions that provide a more fair process for detainees held at Guantanamo Bay—a process that would enable them to have greater benefit of the use of counsel and of evidence in their CSRT hearings.

I will wait until he actually offers that amendment to get into detail. But the point is, we have bent over backward to provide the detainees at Guantanamo the ability to contest their detention and to have that detention reviewed and eventually have it reviewed in U.S. courts. That is a very fair system, more fair than has ever been provided by any other nation under similar circumstances and more than the Constitution requires. So we are treating the people we captured and are holding at Guantanamo in a very fair way.

What we cannot do is take those same kinds of protections and apply them to anybody we capture in a foreign theater who is held in a foreign theater and therefore is not, under current circumstances—and never has been in the history of warfare—subject to the criminal justice system of our country. To take that system and try to transport it to the fields of Afghanistan or Iraq would obviously be not only a breaking of historical precedent but a very bad idea for all of the reasons I just indicated.

I ask my colleagues to give very careful consideration to the dangerous return to the pre-9/11 notion of terrorism as a law enforcement problem that is inherent in section 1023 of the bill. The terrorists have made no secret that they are actually at war with us, and we ignore this point at our peril.

I conclude by reminding my colleagues that the Statement of Administration Policy on this bill indicates that the President would be advised to veto it if these provisions remained. Therefore, I urge my colleagues, when the opportunity is presented, to join me in striking the provisions of the bill, not only as representing good policy but to help us ensure that at the end of the day, there will be a bill signed by the President called the Defense authorization bill.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I believe I have a half hour to speak in morning business. Prior to doing so, I wish to give a brief rejoinder to my colleague from Arizona on some of the comments he just made.

It is my understanding that the underlying Defense Authorization Act has several provisions that are necessary to address shortcomings in the legal process for individuals detained on the battlefield. One of these provisions limits the use of coerced testimony obtained through cruel, inhumane, or degrading treatment. Such testimony is immoral, and this provision is necessary if we are to obtain and use accurate information.

Another provision provides for reasonable counsel and the ability to present relevant information to detainees who have been held for 2 or more years. This is necessary in a war of undetermined duration.

Finally, the bill does not provide classified information to a detainee. It provides for a summary that is intended to be unclassified to the counsel for detainees.

One of the things that might help is if, on line 16, page 305, subsection II, the word ''unclassified'' was added before the word ''summary'' on that line. I believe that is the intent.

GUANTANAMO BAY

Mrs. FEINSTEIN. Mr. President, many in this body and people all over the world watched as America, 5½ years ago, began to arrest, apprehend, and incarcerate detainees. Some were real terrorists, some were conspirators, and some were simply in the wrong place at the wrong time. We watched as Camp X-Ray was built at the naval base at Guantanamo, and we have seen the development of a different and lesser standard of American justice developed for proceedings at that base. Since that time, Guantanamo has been derided as a blight on human rights values and as a stain on American justice worldwide.

I believe the time has come to close Guantanamo. An amendment I have filed with Senator HARKIN—Senator HARKIN is my main cosponsor—and Senator HAGEL would do exactly that. It is cosponsored by Senators DODD, CLINTON, BROWN, BINGAMAN, KENNEDY, WHITEHOUSE, OBAMA, DURBIN, BYRD, yourself, Mr. President, Senator SALAZAR, SENATORS FEINGOLD, BOXER, and BIDEN.

It is my understanding that the Republican side has refused us a time agreement, which means we will not be allowed a vote. The amendment is not germane postcloture. So if the Republican side will not allow us a time agreement, we have, unfortunately, no way of getting a vote on this amendment.

The fact is that yesterday's New York Times editorialized that Guantanamo should be closed. That is what many people believe, and yet we cannot fully debate that issue and vote on it here. I think that is truly a shame.

I very much regret this, but Senator HARKIN, Senator HAGEL, and I wish to take some time to address this issue. I assure this body that we will not stop here, but we will find another venue in which to debate and vote on this matter.

The amendment we have proposed would require the President to close the Guantanamo detention facility within 1 year, and it provides the administration flexibility to choose the venue in which to try detainees—in military proceedings, Federal district courts, or both. The administration would choose which maximum security facilities in which to house them.

Why should we close the Guantanamo detention facility? First and foremost, this administration's decision to create Guantanamo appears to have been part of a plan to create a